Nos. 26 and 30

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

WHITNEY NATIONAL BANK IN JEFFERSON PARISH,
Petitioner,

v.

BANK OF NEW ORLEANS AND TRUST COMPANY, ET AL.,
Respondents.

JAMES J. SAXON, COMPTROLLER OF THE CURRENCY,
Petitioner,

v.

BANK OF NEW ORLEANS AND TRUST COMPANY, ET AL.,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF SUPERVISORS OF STATE BANKS

JAMES F. BELL
1001 Connecticut Avenue, N.W.
Washington, D. C. 20036
Attorney for Amicus Curiae

WILSON - EPES PRINTING CO - RE 7-6002 - WASHINGTON 1, D. C.

INDEX

TABLE OF CITATIONS

CASES:

MISCELLANEOUS:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 26

WHITNEY NATIONAL BANK IN JEFFERSON PARISH,
Petitioner,

v.

BANK OF NEW ORLEANS AND TRUST COMPANY, ET AL.,
Respondents.

No. 30

JAMES J. SAXON, COMPTROLLER OF THE CURRENCY,
Petitioner,

v.

BANK OF NEW ORLEANS AND TRUST COMPANY, ET AL.,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF SUPERVISORS OF STATE BANKS

INTRODUCTION

This Brief of Amicus Curiae is filed pursuant to Rule 42 of this Court with the consent of all parties to this case.

The National Association of Supervisors of State Banks (hereinafter called the "Supervisors") was founded in 1902 and has 52 members. It is composed of the officials of State governments responsible for the supervision of State-chartered banking institutions in every State in the Union and of such officials in the Commonwealth of Puerto Rico and in the Virgin Islands. As of December 31, 1963, there were 9,477 commercial and mutual savings banks chartered under State laws subject to the Supervisors' jurisdiction with total resources in excess of 193 billion dollars.[1]

The present system of federally chartered, or National banks, was created by the National Bank Act of June 3, 1864, c. 106, 13 Stat. 99 (1875), 12 U.S.C. §§21 *et seq.* The Comptroller of the Currency, an office presently held by Petitioner Saxon, is authorized to charter and supervise National banks under the provisions of that Act. As of December 31, 1963, there were 4,615 National banks with total resources in excess of 170 billion dollars.[2]

State banks, under State charters, and National banks, under federal charter, together comprise the "dual banking system" of the United States which has been in existence for 100 years.

The Supervisors have a keen interest in the resolution of the two issues on the merits presented by this case:

---

[1] Federal Deposit Insurance Corporation, *Annual Report* (1963), p. 116; Federal Deposit Insurance Corporation, "Report of Call No. 66, Assets, Liabilities and Capital Accounts, Commercial & Mutual Savings Banking" (Dec. 20, 1963), p. 3.

[2] *Idem.*

Branch banking restrictions. The statutes of the 50 States relating to branches of State banks vary widely. (See Appendix A to this brief). They reflect the particular needs of each State relative to their differing economies, as well as divergent philosophies on the degree of protection which should be afforded small unit banks throughout the State from branches of large city banks. Thus some sixteen States prohibit all branching. Eleven other states permit unlimited statewide branching. The remaining twenty-three States permit branches with widely varying restrictions, primarily related to geography[1] and numbers of banking offices,[2] in an effort to tailor branching requirements to the varying economic conditions within the State itself. Louisiana is an example of this latter category.[3] It prohibits, as a practical matter, all banks from branching across parish lines.[4] Thus, the banks of New Orleans (co-terminus with Orleans Parish, and comprising the largest city and the heaviest banking concentration in the State), are prohibited from branching anywhere else in the State.[5]

The existence of such a multiplicity of varying State branch laws creates a very practical problem. It is obvious that without competitive equality in such an im-

---

[1] Branches may be confined (a) to the city and/or county of the head office and/or contiguous counties; (b) to a specified mileage radius of the head office; or (c) to any of the foregoing dependent upon a minimum population or population range.

[2] The usual provision is that no branch may be established in a designated area where there is already a main office or branch of a State or National bank in operation.

[3] La. R.S. §§ 6:54, 55 (1951).

[4] The statute provides, with certain exceptions not here applicable, that a bank with capital of over $100,000 may establish a single branch in each parish, other than its home parish, having no State banks. There are today, however, no parishes without State banks.

[5] La. R.S. §§ 6:54, 55 (1951).

portant area as the right to branch between State and National banks operating side by side in each State, the dual banking system could not long survive. The class of banks suffering from the competitive disadvantage would quickly convert to the other system. In recognition of this fact, Congress has established a policy of equalization between State and National banks in the matter of branching by prescribing State law as the standard for the establishment of branches by National banks under Section 36(c) of the National Bank Act, 44 Stat. 1228-1229 (1927), as amended, 12 U.S.C. § 36(c) (1963 Supp.).

The Supervisors are therefore deeply concerned with any development the net effect of which would be to give a National bank the right to establish an additional banking office prohibited to a competitor State bank contrary to the established policy of equalization. The transaction here involved would do just that. It was entered into for the admitted purpose of circumventing Louisiana branch law, and the Attorney General of Louisiana has ruled that such a transaction, undertaken by a similarly situated State bank, would be declared an unlawful evasion of Louisiana branch law. (R. 164). Accordingly, the Supervisors urge affirmance of the decision below on the grounds stated in the decision of the United States Court of Appeals for the District of Columbia Circuit (Miller, J.), which is reported at 116 U.S.App.D.C. 285, 323 F.2d 290, and appears at R.454-477. That Court held that when the corporate veil of the intricate transaction here involved was pierced, Petitioner Whitney National Bank in Jefferson Parish (Whitney-Jefferson) emerges not as a new bank, but as a forbidden branch of the Whitney National Bank of New Orleans (Whitney-New Orleans). The court thus struck down a transaction which would have otherwise provided a vehicle, not only in Louisiana but in any of the other thirty-eight states which prohibit or restrict branching, and which bar the Whitney-New Orleans approach as an unlawful evasion of State branch

law, to negate the policy of equalization in branching which Congress sought to achieve in Section 36(c) of the National Bank Act. The continued vitality of the dual banking system requires the maintenance of this policy of equalization.

Bank holding company restrictions: Nineteen states prohibit or restrict bank holding companies in some manner. (See Appendix B to this brief) Accordingly, any holding of this Court that Louisiana Law 275 of 1962,[1] does not prohibit the expansion of a bank holding company organized under Louisiana statutes from opening for business a new National bank subsidiary, or that the law is unconstitutional with such an intention, may affect the validity of other State statutes seeking to prohibit or restrict the expansion of bank holding companies.

Accordingly, the Supervisors alternatively urge affirmance of the decision below on the grounds stated in the decision of the District Court for the District of Columbia (McLaughlin, J.) which is reported at 211 F.Supp 576, *sub nom Bank of New Orleans & Trust Co.* v. *Saxon*, and at R. 435-438. That court held that Louisiana Law 275 of 1962 constituted a bar to the opening for business by Whitney-Jefferson, a subsidiary of the newly organized Whitney Holding Corporation, whose stock was owned by the former stockholders of Whitney-New Orleans, the other subsidiary of Whitney-Holding. It also held that Louisiana Law 275 was validly enacted within the scope of Section 7 of the Federal Bank Holding Company Act of 1956, 70 Stat. 138 (1956), 12 U.S.C. § 1846 (1958), reserving to the States such powers and jurisdiction as they then had, or might exercise in the future, with respect to banks and bank holding companies, and that Louisiana Law 275 was therefore constitutional in its application to National banks.

---

[1] West's La. Rev. Stat. Anno., tit. 6, c. 12, § 1003(5) (1962 Supp.).

QUESTIONS PRESENTED

1. Whether the Comptroller of the Currency is barred from issuing a certificate of Authority to a proposed National bank by reason of Section 36(c) of the National Bank Act establishing State law as the standard by which branches of National banks may be established, when the transaction here involved would be prohibited to a similarly situated State bank under State branch law.

2. Whether the Comptroller of the Currency is barred from issuing a Certificate of Authority to a proposed National bank by reason of a State law restricting the growth of bank holding company systems which was enacted within the scope of the powers and jurisdiction reserved to the States by Section 7 of the Bank Holding Company Act of 1956?

STATUTES INVOLVED AND STATEMENT OF THE CASE

The facts of this case are as set forth in the opinions of the courts below (R. 445-448 and 455-458, 470-476), and in the counter-statement of facts in Respondents' briefs.

The principal statutes involved are set forth in Appendix A to the briefs filed in this court by Petitioner Saxon and Petitioner Whitney-Jefferson.

SUMMARY OF ARGUMENT

I

The question of whether a specific State law is applicable to National banks is not to be answered by reference to the broad and admitted generality that National banks are instrumentalities of the Federal Government and are subject to the paramount authority of the United

States. The answer rather, lies in a search for Congressional intent of the extent to which Congress intended State law to be applicable to National banks.

A reading of the National Bank Act, and related federal banking statutes, demonstrates that Congress intended to give a very special significance to the applicability of State law to the National banks which it created. It did so for a very practical reason. State and National banks operate side by side in each State and it is obvious that neither class of banks could long survive if one had substantial competitive privileges denied to the other. Accordingly, Congress adopted the "policy of equalization" in the National Bank Act. *Lewis* v. *Fidelity & Deposit Co.*, 292 U.S. 559 (1934). It did so (1) by specifically adopting State law in a number of instances as the standard for National banks; and (2) by declining to occupy the field so as to preclude the application of State laws to National banks which do not conflict with Federal law. *Idem.*

No where has this "policy of equalization" been more forcefully applied than in the matter of branching. A reading of the great debates preceding the branch banking provisions enacted into Section 36(c) of the National Bank Act by the McFadden Act of 1927 and the Banking Act of 1933 leaves the impression of a positive, unequivocal and dominant expression of Congressional intent to insure competitive equality between National and State banks in the matter of branching by the adoption of State branch law as the standard for the establishment of branches of National banks. The transaction here involved is a manifest violation of that "policy of equalization". The net result, if approved, would be to permit a National bank to acquire a banking office at a forbidden branch location which is not available to competitor State banks. Certainly, as this Court has said, "if the judicial power is helpless to protect a legislative program from

schemes for easy avoidance, then indeed it has become a handy implement of high finance." *Anderson* v. *Abbott*, 321 U.S. 349, 366-7 (1944). Accordingly, this Court should pierce the corporate veil of the intricate Whitney-New Orleans transaction and declare Whitney-Jefferson to be a forbidden branch. *Idem.*

Petitioners err in contending that the Whitney-New Orleans transaction somehow fits within the mainstream of the group banking tradition in this country which has been treated by Congress apart from branching. There is a vast difference between the typical bank holding company organized for investment purposes, and the transaction here involved of one bank setting out to capitalize a holding company, and through it, an affiliate in an adjoining parish, all for the purpose of avoiding State branching law. Clearly, if Congress had really intended by the Bank Holding Company act of 1956, or elsewhere, to give a "green light" to the Whitney-New Orleans transaction as a device to avoid the statutes of the thirty-nine states which prohibit or limit branch banking, there obviously would be today far more than just fifty-two holding companies registered under the Act in the entire country.

II.

The Whitney-New Orleans transaction is also prohibited by Section 3(5) of Louisiana Law 275 of 1962 which prohibits any subsidiary of a bank holding company not now opened for business from doing so. This provision is part of a statute reflecting a policy of Louisiana to prohibit all bank holding company systems within the borders of the State.

Again, there is no point in debating the constitutionality of this statute within the framework of the admitted proposition that National banks are instrumentalities of the Federal Government. The question is

whether Congress intended to permit States to be more restrictive in their regulation of bank holding companies than is contained in the Bank Holding Company Act of 1956.

This is precisely what Congress did in Section 7 of the Bank Holding Company Act of 1956, when it reserved to the States such powers and jurisdiction as they then had, or might exercise in the future, with respect to banks and bank holding companies. At that time, Congress was aware that a number of States had laws which purported to prohibit or restrict bank holding companies, some of which laws were applicable to National banks. (Appendix C and D.) There is, therefore, no doubt that States have the right to restrict or prohibit the growth of bank holding companies, which statutes are applicable to National banks. The appeal of the decision in *Braeburn Securities Corp.* v. *Smith*, 15 Ill. 2d 55, 153 N. E. 806 (Ill. Sup. Ct. 1958), so holding was dismissed by this Court *per curiam* for want of a substantial federal question. 359 U.S. 311 (1959).

Petitioners seek to escape the inexorable logic of the foregoing by pinpointing Section 3(5) of Louisiana Law 275, applicable to this case, which they correctly note is not specifically to be found in other State statutes restricting bank holding companies. Their argument appears to be that, assuming the Section 7 reservation of power validly embraces a State statute prohibiting a bank holding company from acquiring the stock of a National bank subsidiary, it does not embrace an additional effort to restrict bank holding company expansion through a provision, such as Section 3(5) of Louisiana Law 275, prohibiting a bank holding company from opening for business any National bank subsidiary which has not yet opened for business. This is a strained distinction without legal significance. If, under the Section 7 reservation of power, Congress intended to permit a State to prohibit

a bank holding company from acquiring stock in a proposed new National bank subsidiary, it certainly intended to permit a State to prohibit a bank holding company from opening for business any new National bank subsidiary, the stock of which has just been acquired. There is absolutely nothing in the legislative history of the Bank Holding Company Act of 1956 indicating that such a National bank subsidiary should have some sort of special exemption from the general policy of Section 7. It is still in an embryonic stage until the issuance of a certificate of authority by the Comptroller. Only with the issuance of such a certificate could it become, for the first time, a lawful bank authorized to do business.[1] It is the validity of the issuance of such a certificate which is at issue in this case.

ARGUMENT

I. The issuance of a certificate of authority to Whitney-Jefferson would constitute an unlawful evasion of the provisions of Section 36(c) of the National Bank Act.

A. *In the National Bank Act Congress has adopted a "policy of equalization" between National and State banks.*

The *Amicus Curiae* does not contest the proposition advanced with great vigor from time to time in Petitioners' briefs to the effect that National banks are instrumentalities of the Federal Government and are subject to the paramount authority of the United States. That issue has long since been resolved in the great constitutional debates which surrounded the creation of the

---

[1] *Cf., Commercial State Bank of Roseville* v. *Gidney*, 174 F.Supp. 770 (D.D.C. 1959), *aff'd per curiam*, 108 U.S. App. D.C. 37, 278 F.2d 871 (1960), citing *National Bank of Detroit* v. *Wayne Oakland Bank*, 252 F.2d 537 (6th Cir. 1958) *cert. denied*, 358 U.S. 830.

First (1791-1811) and Second (1816-1832) banks of the United States holding charters from Congress.[1] Although many persons, including Jefferson, who opposed the creation of the First Bank, and Jackson, who vetoed the charter of the Second Bank, felt that Congress had no Constitutional authority whatever to charter banks, Chief Justice John Marshall set the matter to rest in his opinion in *M'Culloch* v. *Maryland*, 4 Wheat. 316 (1819). While recognizing that "it does not appear that a bank was in the contemplation of the framers of the Constitution", he enunciated the doctrine of implied powers and held that a bank could be chartered by Congress as a financial agent of the Federal Government to assist in the implementation of the Federal Government's fiscal powers which were specifically granted to Congress by the Constitution. The question of the paramount authority of Congress over National banks has, therefore, long since been settled.

In line with the foregoing, the *Amicus Curiae* is obviously aware that Congress has the power, *if* it wished to utilize such power, to bar the applicability of State law to the operations of National banks. The question, however, which forms the pivotal background for the issues in this case, is the *extent* to which Congress elected to permit the applicability of State law to National banks, and, indeed, the extent to which it intended to *adopt* State law as the standard for banking operations of National banks.

The creation of the dual banking system by the addition of a system of National banks under federal charter operating side by side in each State with State banks

---

[1] See, e.g., Conant, *A History of Modern Banks of Issue* (G. A. Putnam's Sons, New York and London, 1915); Kane, *The Romance and Tragedy of Banking* (The Bankers Publishing Co., N.Y., 1923); Prochnow, *American Financial Institutions* (Prentice Hall, 1961).

under State charter required Congress to *affirmatively* decide this question.[1]

The necessity for such affirmative action arose because of the fact that National and State banks are competitors for depositors in each State. It is elementary economics that although State statutes, governing State banks, and the National Bank Act, governing National banks, can (and do) vary in many significant areas, the survival of one or the other class of banks in any State must rest upon an equality in certain basic competitive areas. If one or the other class of banks in a particular State have far more liberal rights and privileges than the other in such important areas as the right to branch, to perform trust functions, to pay interest on deposits, or charge interest on loans, etc., the underprivileged banks would quickly convert to the other system leaving the dual banking system an empty shell. For example, if Congress should authorize all National banks to open branches in the city in which their home office is located, but not elsewhere in the State, such National banks would be placed at an immediate competitive disadvantage with State banks in States which permit statewide branch banking. Similarly, such National banks would be granted an immediate competitive advantage over State

[1] It did not do so immediately because the "birth" date of the dual banking system, as we know it today, must realistically be placed some time later than the passage of the National Bank Act. In 1865, Congress placed a prohibitive tax on State bank notes, then the principal source of State bank income, with the avowed purpose of putting State banks out of business. As a result the number of State banks declined drastically and the survival of the State banking system was largely accredited to the growth and profitability of deposit banking. See sources cited in note 1, p. *11 supra*. By 1892, however, almost 30 years after the prohibitive bank note tax, the number of State banks overtook the number of National banks and the dual banking system may by then be considered as having been firmly established. Board of Governors of the Federal Reserve System, "Banking Studies" (1941), pp. 15, 418.

banks in States which prohibit all branching, requiring the legislatures of these States to mobilize into immediate action to amend their statutes to meet the provisions of the National Bank Act, regardless of whether the State legislatures were of the opinion that economic conditions warranted granting State banks the right to branch.

Congress solved the foregoing problem in a very practical way:

First, it decided upon a "policy of equalization" between National and State banks by *adopting* State law as the standard for National banks in most of the important competitive areas. *Lewis* v. *Fidelity & Deposit Co.*, 292 U. S. 559 (1934). In that case the question was whether a 1930 amendment to the National Bank Act authorizing a National bank to "give security" for State deposits meant merely a pledge of specific assets or a general lien upon the bank's assets. State banks, competitors of National banks for such deposits, had the right to give the more impressive security of a general lien. This Court ruled in favor of the general lien on the basis of the "policy of equalization" which it held Congress had adopted in the National Bank Act. At 292 U.S. 559, 564-565, Mr. Justice Brandeis, writing for the Court, said:

> "For the main purpose of the 1930 Act was to equalize the position of national and state banks; and without such power national banks would not in Georgia be upon an equality with state banks in competing for deposits. The *policy of equalization* was adopted in the National Bank Act of 1864, and has ever since been applied, in the provision concerning taxation.[2] In amendments to that Act and in the Federal Reserve Act and amendments thereto the policy is expressed in provisions conferring power to establish branches;[3] in those conferring power to act as fiduciary;[4] in those concerning interest on deposits;[5] and in those concerning capitalization.[6]" (Footnotes omitted) (Emphasis supplied)

Thus, some of the more important instances of the specific adoption of State law in the National Bank Act are as follows: (a) *Branches.* Section 36(c) adopts State law as the standard for the establishment of branches by national banks. 44 Stat. 1228-29 (1927), as amended, 12 U.S.C. § 36(c) (1963 Supp). (b) *Fiduciary powers.* The Comptroller may grant a permit to National banks, "when not in contravention of State or local law", to "act as a trustee . . . or in any other fiduciary capacity in which State banks . . . which come into competition with National banks are permitted to act under the laws of the State in which the National bank is located." 76 Stat. 668, (1962), 12 U.S.C. 92a(a) (1963 Supp), replacing 38 Stat. 26 (1913). (c) *Interest on loans.* National banks may charge interest on loans allowed by the law of the State where the bank is located if such a rate is greater than 1% in excess of the discount rate on ninety-day paper in effect at the local Federal reserve bank. 48 Stat. 191 (1933), as amended, 12 U.S.C. § 85 (1958). (d) *Interest on time and savings deposits.* National banks may not pay a greater rate of interest than the maximum rate authorized by law upon such deposits by banks organized under the laws of the State in which the National bank is located. 44 Stat. 1224-25, 12 U.S.C. § 371. (e) *Capitalization.* In certain instances State law is the measure of allowable capitalization of new National banks. 48 Stat. 185 (1933), 12 U.S.C. § 51 (1958). (f) *Merger and conversion.* No conversion of a National bank to State bank, or its merger with a State bank, may take place in "contravention of the law of the State in which the National banking association is located." 64 Stat. 456 (1950), 12 U.S.C. 214c (1958).[1]

---

[1] For cases, other than *Lewis* v. *Fidelity & Deposit Corp.*, *supra*, holding that in one or more of the above categories Congress *specifically* intended to establish competitive equality between National and State banks by the adoption of State law as the standard for National banks, see, *National Bank of Detroit* v. *Wayne*

Secondly, in addition to specifically applying State law to National banks in many instances, Congress did not seek to occupy the field so as to preclude the application of State laws to National banks which do not conflict with Federal law. Sometimes it made a specific reservation of power, as for example, the reservation to the State of broad areas of taxation of National banks, 44 Stat. 223-24 (1926), 12 U.S.C. § 548 (1958), and the reservation of powers over bank holding companies, and bank subsidiaries in the Bank Holding Company Act of 1956, 70 Stat. 138 (1956), 12 U.S.C. § 1846 (1958), which will be discussed at length in the second section of this brief. The courts have also enunciated this general principal on a number of occasions. Thus in *First Nat'l Bank in St. Louis* v. *Missouri*, 263 U.S. 640 (1924), this Court held—at a time prior to the passage of Section 36(c) of the National Bank Act—that a Missouri statute forbidding branch banks was applicable to National banks. Similarly, in *Lewis* v. *Fidelity & Deposit Co.*, a portion of which opinion is quoted above illustrating the "policy of equalization", this Court upheld the applicability of provisions of Georgia law relating to duties of a depository. 229 U. S. 559, 565-6.[1]

* * * *

It is thus very important to note at the outset of a consideration of the issues in this case that Congress has given a *special* significance to the applicability of State law to the National banks which it has created. It has

---

Oakland Bank, 252 F.2d 537 (6th Cir. 1958), *cert. denied*, 358 U.S. 830; *Federal Deposit Ins. Corp.* v. *Tremaine*, 133 F.2d 827 (2nd Cir. 1943); *South Dakota* v. *National Bank of South Dakota*, 219 F.Supp. 842 (S.D.S.D. 1963) aff'd No. 17,460 (8th Cir. Aug. 10 1964); *Commercial State Bank of Roseville* v. *Gidney*, 174 F.Supp. 770 (D.D.C. 1959), *aff'd per curiam* 108 U.S. App. D.C. 37, 278 F.2d 871 (D.C. Cir. 1960).

[1] See, also *Anderson Nat'l Bank* v. *Luckett*, 321 U.S. 233 (1944); *Chase Securities Corp.* v. *Husband*, 302 U.S. 660 (1938); *McClellan* v. *Chipman*, 164 U.S. 347 (1896).

intended an applicability of such law in many of the most important and vital areas of banking. It did so because only by a "policy of equalization" in basic competitive areas can the dual banking system, as a practical matter, survive.[1]

B. *Nowhere has the Congressional "policy of equalization" been more forcefully expressed in the National Bank Act than in Section 36(c) wherein Congress required the Comptroller to follow State law as the standard for the establishment of branches of National banks.*

A review of the history of Section 36(c) of the National Bank Act relating to branches will demonstrate the positive expression of Congressional intent to insure

---

[1] The "policy of equalization" is entirely consistent with the oft-quoted proposition in Petitioners' briefs that the National Bank Act "constitutes 'by itself a complete system for the establishment and government of National Banks.'" *Deitrick* v. *Greaney*, 309 U.S. 190, 194 (1940). As noted above, the "policy of equalization" was *incorporated* by Congress into that system by the adoption of certain nondiscretionary State laws to be applied by the Comptroller in his regulation of National banks, and by provision for the applicability to National banks of State laws which do not conflict with the pattern established in the Act. Congress went no further, and certainly did not, for example, jeopardize the independence of the National banking system, and hence the "duality" of the dual banking system, by subjecting any decision of the Comptroller to a review or approval by a State Supervisor. *Rushton ex. rel State Banking Comm'r.* v. *Michigan Nat'l Bank*, 298 Mich. 417, 299 N.W. 129 (1941). The very concept of the dual banking system embraces an independence of action on the part of both the Comptroller and the Supervisors in the establishment of National and State banks, although "cooperation" between the two "appears to have been intended by Congress. . . ." *National Bank of Detroit* v. *Wayne Oakland Bank*, 252 F.2d 537, 543 (6th Cir. 1958), *cert. denied*, 358 U.S. 830. However, the independence of the Comptroller within the pattern of the National Bank Act does *not* embrace a complete independence of State laws. Congress, in its "policy of equalization" reflected in the Act, has demonstrated a clear intent that national banks be subject to such State laws in many of the most important areas of banking.

equality between National and State banks in the matter of branching. This point will have an obvious bearing on a determination of the question, considered later in the brief, of whether Congress *really* contemplated an avoidance of State branch law through the transaction employed by Whitney-New Orleans in this case.

Prior to 1927. Between 1864 and 1927, the National Bank Act did not provide for the establishment of branches by National banks. This Court had made it clear that, except in the case of certain limited and specifically stated exceptions by Congress, National banks had no branch authority whatever. *First Nat'l. Bank of St Louis* v. *Missouri*, 263 U.S. 640 (1924). The law of many States, on the other hand, permitted State-chartered banks to establish branches.

Prior to the turn of the century, this situation created no problem. At that time there only were 87 banks (82 State and 5 National) operating a total of 119 branches, most of which were outside of the head office city. By the end of 1923, however, there were 671 banks (580 State and 91 National) operating 2,054 branches, most of which were in the head office city.[1] In his Annual Report for 1923, the Comptroller of the Currency, after discussing this matter said (p. 6):

> "If, however, state member banks engage in unlimited branch banking, it will mean the eventual destruction of the national banking system. . . ."

And in his 1924 Report, he said (p. 4):

> "The question as to whether national banks may be granted the opportunity to meet the competition of state banks in intra-city banking in my opinion involves the question of the perpetuation of the national banking system."

---

[1] "Banking Studies", note 1, p. 12 *supra*, at p. 428.

By this time, Congress had become aware of the problem. The House Banking and Currency Committee held hearings in April of 1924 at which the Comptroller of the Currency reiterated his warning.[1] The House Committee then reported out a bill, the purpose of which was to equalize National and State bank branching opportunities by granting National banks the right to establish branches in their home-office towns, and by limiting branching by State bank members of the Federal Reserve System (then, as now, the largest of the State banks) to such in-town branches.[2] The House Report said:

> "The bill recognizes the absolute necessity of taking legislative action with reference to the branch banking controversy. The present situation is intolerable to the national banking system. The bill proposes the only practicable solution by stopping the further extension of State-wide branch banking in the Federal reserve system by State member banks and by permitting national banks to have branches in those cities where State banks are allowed to have them under State laws." [3]

And when the bill reached the floor, Representative McFadden, its sponsor, said:

> "I may say here that this permission for national banks to meet the competition of State banks engaged in branch banking in certain large cities is absolutely vital to the maintenance of the National banking system. It is an economic fact easily demonstrated by reference to recent banking history that the national banks in those cities where the State banks are engaged in branch banking will

---

[1] Hearings before House Committee on Banking & Currency on H.R. 6855, 68th Cong., 1st Sess. (1924), pp. 17, 30, 34.

[2] H.R. Rep. No. 583, on H.R. 8887, House Banking and Currency Committee, 68th Cong., 1st Sess. (1924) Secs. 8 and 9.

[3] *Idem.* at p. 5.

> gradually die out for want of the power to meet their competitors on equal terms unless this provision of the bill is enacted into law." [1]

This bill passed the House.[2] However, although a similar bill was recommended favorably by the Senate Banking and Currency Committee,[3] it failed of passage prior to the expiration of the 68th Congress.[4]

McFadden Act of 1927. The bill which ultimately became the McFadden Act of 1927 passed during the 69th Congress. Competitive equality was achieved granting National banks the right to have intra-city branches

> "if such establishment and operation are at the time permitted to State banks by the law of the State in question"

and, at the same time, limiting State banks, members of the Federal Reserve System to intra-city branching. 44 Stat. 1228 (1927), as amended 12 U.S.C. 36(c) (1963 Supp.); 44 Stat. 1229 (1927), 12 U.S.C. 321 (1958).

One important additional indication of the mood of Congress in making it clear that the question of the desirability of branches was a matter strictly up to the *States* to decide, emerged from the Senate rejection of the so-called "Hull amendments" to the House bill in the 69th Congress. The House bill (H.R. 2) had originally proposed that National banks might only establish in-town branches in States where State law permitted in-town branches at the time of the enactment of the bill. No right was given to such National banks if, at a later time, State law permitted State banks to establish in-

---

[1] 65 Cong. Rec. 11298 (1924).

[2] See H.R. Rep. No. 83, 69th Cong., 1st Sess. p. 2 (1926).

[3] S. Rep. No. 666 on S. 3316, Senate Banking and Currency Committee, 68th Cong., 1st Sess. (1924).

[4] Note 2, *supra*.

town branches.[1] The Senate Banking and Currency Committee, however, struck that provision on the grounds that it constituted an unwarranted "pressure" by Congress on State legislatures to decline to expand branch authority, and that the matter of branching privileges was a matter for the *States* to decide.[2] The Senate position was upheld in conference and ultimately enacted into law.[3]

Banking Act of 1933. During the depression, a fundamental challenge to the principle of competitive equality in branching occurred. Many persons felt that many bank failures during the Bank Holiday were due to the fact that small rural banks were not strong enough to weather economic adversity, and that these locations could best be served by branches of larger and stronger banks. Their view was that branch banking should be authorized for national banks *regardless* of state branch law in order to meet what was considered to be a crisis in banking.[4]

This view was stated by the dominant banking figure of the times, Senator Carter Glass of Virginia. Accordingly, in 1932, the Senate Banking and Currency Committee reported out a bill, S. 4412, to expand the authority of a National bank to establish branches granted in the McFadden Act of 1927 beyond just the municipality in which its main office was located, *irrespective* of State law. The Senate Report, in its Section under "Insolvency of Banks", said:

---

[1] Note 2, p. 19 *supra*, at pp. 2, 4.

[2] S. Rep. No. 473, 69th Cong., 1st Sess. (1926), pp. 9-10.

[3] H. R. Rep. No. 1481, 69th Cong., 1st Sess. (1926), p. 6.

[4] See, *e.g.*, testimony of Comptroller of the Currency, J. W. Pole during the 1931 hearings before the Subcommittee of the Senate Banking and Currency Committee. Hearings before Subcom. of Sen. Com. on Banking & Currency, pursuant to S. Res. 71, 84th Cong., 1st Sess. (1955) pp. 7-19.

". . . provision for branch-banking powers under carefully qualified conditions with a view to making a larger experiment with branch banking is deemed essential and due provision for it is made. Specifically, what is proposed is the grant of power to establish branches of national banks not merely in the towns and cities in which they are located but also outside of such limits at any point within the borders of the State in which they exist, irrespective of State laws."[1]

This proposal met with vigorous opposition. It was obvious that if National banks were granted a competitive advantage over State banks in the matter of branching, State banks would convert to National banks and the State banking system would be destroyed, unless the State legislatures in all of the nonbranch or limited-branch states moved immediately to conform their statutes to this unrestricted branch proposal—the reverse effect of the situation in 1922-27 when the Comptroller argued that unless National banks were given the right to branch in competition with State banks, the National banking system would be destroyed. Thus, Senator Norbeck, writing for the Minority of the Senate Committee ". . . in protest against the proposed extension of the branch banking. . . ." said:

"In speaking of our banking system, we must keep in mind that we have: (1) A system of national banks chartered and supervised by the Federal Government. (2) We have a competitive system, that of State banks, chartered and supervised by the States.

There is difference of opinion among well-informed people as to their comparative merits, and certainly there is a great desire on the part of certain people to wipe out the State banking system. What can not be done directly by law may be done by giving the

[1] S. Rep. No. 584, 72nd Cong., 1st Sess., p. 11 (1932).

> national system such an advantage that the competitive State system can not exist." [1]

The debate continued on the floor of the Senate. 75 Cong. Rec. 9890 *et seq.* Senator Glass pressed the need for Statewide branching regardless of State law in order that larger banks could take over smaller banks and convert them into branches. 75 Cong. Rec. 9974 (1932). Senator Norbeck led the opposition proposing an amendment

> ". . . to strike out section 19 of the bill, which permits an enlargement of the branch-banking privileges.
>
> I do that mainly because I believe in the American system of banking. We have a dual system. We have two systems. We have one controlled by the States, we have another one controlled by the Federal Government. The two have grown up side by side. I think they have rendered splendid service, and I think we should be ever jealous of anything that will tend to destroy one system for the benefit of the other." 75 Cong. Rec. 9974 (1932).

And later he said:

> "It is a bill to establish a new system of banking all over the United States, to do away with the dual system of banking, and to substitute a single system of banking, which I feel will be under too much central control." 75 Cong. Rec. 13002 (1932).

A compromise position was finally taken between Senator Glass' unlimited branch expansion position and Senator Norbeck's resistence to any branch expansion. The bill was finally passed after an amendment was adopted on the floor of the Senate whereby National banks could establish out of town branches if such branches could be

---

[1] S. Rep. No. 584, 72nd Cong., 1st Sess. (1932) Pt. II (Minority Views), p. 1.

established by State banks by the law of the State in question, thus restoring the principle of competitive equality. This amendment was known as the Bratton amendment, and, as it finally emerged, was itself amended by amendments of Senators Wheeler and Blaine.

Senator Bratton of New Mexico said:

> "I think the proposed bill goes too far. It seems to me that the question of whether branch banking shall be permitted in a given State should be determined by that State. . . . We are asked to permit national banks, in disregard of State laws, overriding the sentiment of a State, to engage in branch banking whether it is desired in the State or not." 76 Cong. Rec. 1449 (1933).

Accordingly, he proposed an amendment which read as follows:

> "A national banking association may establish and operate new branches within the limits of the city, town, or village, or at any point within the State in which said association is situated, if such establishment and operation are at the time permitted to State banks by the law of the State in question." 76 Cong. Rec. 1997 (1933).

Senator Wheeler of Montana supported Senator Bratton. He said

> ". . . I do not want the United States Government to permit the establishment of branches in States where the people by express statute have forbidden it; or where they have not passed upon the matter, I do not want to permit national banks to go in there and establish branches against the will of the people." *Idem.*

Senator Wheeler also requested that the words "expressly authorized" be substituted for the word "permitted" in the Bratton amendment, which he explained as desirable to handle his concern that a State statute silent

on the matter of branching might be construed as permitting branch banking. 76 Cong. Rec. 1997. Senator Bratton also accepted an amendment offered by Senator Blaine including the language "under restrictions as to location imposed by the law of the State on State banks". 76 Cong. Rec. 2079. As such, the amendment passed the Senate.[1]

The bill failed to pass the House, however, as the 72nd Congress expired. Accordingly, in May of 1933, both the Senate and House Committees on Banking and Currency

---

[1] This is the only legislative history on the inclusion of the "location" language in the amendment to the branch provisions of Section 36(c) by the Banking Act of 1933. Although not an issue in this case, the *Amicus Curiae* cannot help but call the attention to this Court to the error in the Petitioners' briefs wherein they continually refer to the restrictions of Section 36(c) as embracing "geographic" limitations in State law as if such limitation are the *only* type of restriction in State law applicable to National banks under Section 36(c) of the National Bank Act. As noted at p. 3 *supra*, there are other restrictions in State law on branching, such as numbers restrictions and banking function limitations. There is no "location" language in the McFadden Act of 1927 (see p. 19, supra) to even suggest a Congressional intent that only geographic limitations in State law should apply to National banks. Further, the unexplained "location" amendment to the Bratton amendment in the Banking Act of 1933 cannot possibly over-come the demonstrable Congressional intent ". . . to have *exactly* the same standards—state law—apply to the establishment of National bank branches as apply to the establishment of State bank branches", *Commercial State Bank of Roseville* v. *Gidney*, 174 F.Supp. 770, 775 (D.D.C. 1959), *aff'd per curiam*, 108 App. D.C. 37, 278 F.2d 871 (D.C. Cir. 1960). (Emphasis in original) Implementation of Congressional intent to achieve competitive equality in branching requires that National banks be bound by *all* nondiscretionary limitations in State branch law under Section 36(c) not just so-called "geographic limitations". Lower courts have applied such nongeographic limitations, such as restrictions on branching in localities where there is already a banking institution present. *National Bank of Detroit* v. *Wayne Oakland Bank*, 252 F.2d 537 (6th Cir. 1958), *cert. denied*, 358 U.S. 830; *Suburban Trust Co.* v. *National Bank of Westfield & Howell*, 222 F.Supp. 259 (D.N.J. 1962), but the Comptroller has apparently declined to accept these decisions outside of the jurisdiction in which they were decided.

favorably reported legislation, S. 1631, and H.R. 5661, which basically contained the Bratton amendment as passed in the prior session. S. Rep. No. 77, 73rd Cong., 1st Sess. on S. 1631, pp. 11, 17 (1933); H.R. Rep. No. 150, 73rd Cong., 1st Sess., on H.R. 5661, p. 4.[1]

* * * *

It was necessary to set out the legislative history of Section 36(c) of the National Bank Act in some detail in order to capture the positive, unequivocal, and dominant expression of Congressional intent to insure equality between National and State banks in the matter of branching. In the McFadden Act of 1927 Congress adopted the "policy of equalization" with regard to in-town branches of National and State member banks, and in the Banking Act of 1933 adopted the "policy of equalization" with regard to out-of-town branches. It is against the background of this forceful expression of Congressional intent that the Whitney-New Orleans transaction must be considered.[2]

---

[1] After passage of both the House and Senate, the bill went to Conference. In Conference Committee, the word "statute" was placed before the phrase "law of the state" in the first part of the Bratton amendment. No explanation was given for the insertion of this word. H.R. Rep., 254, 73rd Cong., 1st Sess., p. 29 (1933).

[2] The question of whether Whitney-Jefferson is, in reality, a prohibited branch of Whitney-New Orleans, technically turns upon whether it is a prohibited "out of town" branch under the amendments to Section 36(c) of the Banking Act of 1933. However, the question can only really be answered within the framework of the branch banking *policy* of Section 36(c), embracing both a consideration of the "in town" branch provisions of the McFadden Act of 1927 and the "out of town" branch provisions of the Banking Act of 1933.

C. ***A certificate issued to Whitney-Jefferson would violate the positive, unequivocal and dominant expression of Congressional intent to insure equality between National and State banks in the matter of branching. Accordingly, the corporate veil of the intricate transaction here attempted should be pierced, and Whitney-Jefferson revealed as a forbidden branch of Whitney-New Orleans.***

It is not really necessary at this point to discuss in detail the question of motivation or intent in the Whitney-New Orleans transaction, although it is difficult to read the record below without reaching the conclusion that the whole transaction was entered into *solely* to avoid Louisiana branch banking law.[1]

The question, rather, is the *result* of the transaction. That result is clearly set forth in the opinion of the Federal Reserve Board. *In the Matter of the Application of Whitney Holding Corporation*, dated May 3, 1962 (R. 99). The Board there approved the Whitney Holding Company acquisition of Whitney-Jefferson *as if it were simply a banking office of Whitney-New Orleans in Jefferson Parish.* And, of course, Petitioners can hardly dispute the very basis for approval by the Board upon which they now rely. The Board said:

> "The stated purpose of the proposed holding company system is to enable an organization centered about Whitney New Orleans to provide banking services not only through its existing 12 offices within the City of New Orleans *but also through offices in the East Bank of Jefferson Parish.* The holding company system will be under the direction of the present executive management of Whitney New Orleans; *in fact, for present purposes the holding company iself*

[1] The President of the Whitney National Bank of New Orleans testified before the Federal Reserve Board that "If branch banking were permitted in Jefferson Parish, I wouldn't be here because it would be much simpler to have it by way of a branch." (R. 74).

> *is simply the means by which Whitney banking offices may be established and operated in East Bank.* Consequently, the character of the management and the prospects of the Applicant and its two proposed subsidiary banks may be evaluated largely on the basis of the financial history and condition, character of management, and prospects of Whitney New Orleans." (R. 100-101) (Emphasis supplied)
>
> • • • •
>
> "To the extent that the prospects of Whitney Jefferson depend upon the quality of its management, those prospects also are favorable, since Whitney Jefferson will be subject to general policy direction by Applicant, and Applicant may be expected to provide competent local management for Whitney Jefferson." (R. 101).

Thus, the Federal Reserve Board found that Whitney-Jefferson is simply the means by which "Whitney banking offices" may be established on the East Bank of the Mississippi in Jefferson Parish.[1]

It is equally clear that Louisiana branch law prohibits a similarly situated State bank from following the Whitney-New Orleans approach to secure a banking office in Jefferson Parish. An application for such an office in the form of a "new" bank application would be rejected as an unlawful evasion of the Louisiana bank statutes. The Courts of Louisiana as do other State and Federal courts, pierce the corporate veil if the exigencies of the situation so demand,[2] and the Attorney General of Louisiana, con-

---

[1] It should be noted that the Federal Reserve Board did not pass upon the question of whether Whitney-Jefferson would constitute an unlawful branch of Whitney-New Orleans. It considered the resolution of such a question as falling within the province of the Comptroller (R. 168). It is the validity of the Comptroller's decision on this matter which, of course, is the sole issue before this Court.

[2] *Meraux* v. *R. R. Barrow, Inc.*, 219 La. 309, 52 So.2d 863 (1951); *Brooks-Scanlon Co.* v. *Railroad Comm'n of Louisiana*, 144 La. 1086,

struing the branch provisions of Louisiana law within the factual context of this case, has ruled:

> ". . . that a bank holding company may not circumvent the branch bank laws of our State by the acquisition of a controlling interest in a subsidiary which is located in a parish other than the domicile of the parent company." (R. 164).

Petitioner Whitney-Jefferson endeavored below to deprecate the opinion of the Louisiana Attorney General. In doing so, it completely missed the point. No contention is being made that the opinion is "binding" on any court. The question is whether the opinion correctly construes Louisiana law. The opinion sets out in detail the philosophy behind the branch banking laws of Louisiana, and, under the "general principle of law that corporate entities must be disregarded where they are made the implements for avoiding a clear legislative purpose", concluded that a Whitney-New Orleans transaction attempted by a similarly situated State bank would be struck down as an evasion of Louisiana branch law. (R. 162-63). At least one indication that this was the prevailing view through the over 25 years in which branch banking restrictions have been in effect in Louisiana, La.R.S., §§ 6:54, 55, is to be found in the fact that, apparently, no one ever tried a Whitney-New Orleans type transaction until the instant case.[1] A further indication of the policy of Louisiana is the speed with which it acted in enacting Louisiana Law 275 of 1962, when faced with the first threat of a bank holding company.[2]

---

81 So. 727 (1919); *Brown* v. *Benton Creosoting Co.*, 147 So.2d 89 (La. App. 1963).

[1] The source of Section 54 was Act No. 254 of 1938.

[2] Of course, the fact that the Louisiana legislature specifically acted in Louisiana Law 275 to prohibit all bank holding companies, cannot be construed as meaning that it sanctioned their use prior to that time to defeat Louisiana branch restrictions. *Cf.*, *Anderson* v. *Abbott*, 321 U.S. 349, 365 (1944), where this Court said, in an analogous situation: "Yet the fact that Congress later wrote specific

It is clear from the foregoing, that a certificate issued to Whitney-Jefferson would violate the positive, unequivocal and dominant expression of Congressional intent in the McFadden Act of 1927 and the Banking Act of 1933, to insure equality between National and State banks in the matter of branching. Whitney-New Orleans would be able to establish an additional banking office in a location prohibited to its competitor State banks. This Court should, therefore, affirm the court below on the grounds that Whitney-New Orleans' transaction defeats the legislative "policy of equalization" in branching which Congress adopted in Section 36(c) of the National Bank Act. Such action is required by the principle expressed in *Anderson* v. *Abbott*, 321 U.S. 349 (1944) where this Court said:

> "It has often been held that the interposition of a corporation will not be allowed to defeat a legislative policy, whether that was the aim or only the result of the arrangement. United States v. Lehigh Valley R. Co. 220 U S 257, 55 L ed 458, 31 S Ct 387; Chicago, M. & St. P. R. Co. v. Minneapolis Civic & Commerce Asso. 247 U S 490, 62 L ed 1229, 38 S Ct 553; United States v. Reading Co. 253 U S 26, 64 L ed 760, 40 S Ct 425. The Court stated in Chicago, M & St. P. R. Co. v. Minneapolis Civic & Commerce Asso. supra (247 U.S. p 501, 62 L ed 1237, 38 S Ct 553) that 'the courts will not permit themselves to be blinded or deceived by mere forms of law' but will deal 'with the substances of the transaction involved as if the corporate agency did not exist and as the justice of the case may require.'" 321 U.S. 349, 362-63.

* * * *

---

standards into the law means no more than a recognition on its part of an evil and a fashioning by it of a specific remedy. It can hardly mean that Congress by its earlier silence had sanctioned the use of the holding company to defeat the protection which it had provided for depositors of national banks."

> "If the judicial power is helpless to protect a legislative program from schemes for easy avoidance, then indeed it has become a handy implement of high finance. Judicial interference to cripple or defeat a legislative policy is one thing; judicial interference with the plans of those whose corporate or other devices would circumvent that policy is quite another. Once the purpose or effect of the scheme is clear, once the legislative policy is plain, we would indeed forsake a great tradition to say we are helpless to fashion the instruments for appropriate relief." 321 U.S. 349, 366-67

In the *Anderson* case this Court pierced the corporate veil of a bank holding company organized, in part, by a Louisville National bank on a share exchange basis, and held that the stockholders of the holding company (formerly the stockholders of the bank) were liable for an assessment on the shares of the National bank held in the portfolio of the holding company.

The *Anderson* case, and the cases cited by this Court therein, are, of course, expressive of what is now hornbook law that

> "Where the corporate form of organization is adopted or a corporate entity is asserted in an endeavor to evade a statute or modify its intent, the courts will disregard the corporation or its entity, and look at the substance and reality of the matter." Fletcher, Cycl. Corps., § 45 (1963).

Accordingly, the *Amicus Curiae* respectfully submits that, in view of the foregoing, the corporate veil of the intricate transaction here attempted should be pierced, and Whitney-Jefferson revealed as a forbidden branch of Whitney-New Orleans.

Attention will now be briefly turned to opposing arguments advanced by Petitioners.

D. *The arguments advanced by Petitioners that Congress intended, or contemplated, an avoidance of State branch law by the transaction here involved are without merit.*

Petitioners have recited in their briefs various differences between branch banking and the operations of a bank holding company system in support of their argument that the court below erred in holding that Whitney-Jefferson was, to all intents and purposes, a forbidden branch of Whitney-New Orleans.

Reduced to its essence, this argument simply comprises the contention that operating differences between group and branch banking are such that a subsidiary of a bank holding company can *never* be a forbidden branch under 12 U. S. C. 36(c), and, therefore, a court can *never* pierce the corporate veil of a bank holding system to find an evasion of the Congressional "policy of equalization" reflected in Section 36(c) of the National Bank Act. They would thus disagree with the only judicial expression directly in point in *First Nat'l Bank in Billings* v. *First Bank Stock Corp.*, 306 F.2d 937, 942 (9th Cir. 1962):

> "We do not agree with appellees that the fact that the two banks are separate corporate organizations demonstrates conclusively that one is not a branch of the other. In the banking field, as elsewhere, courts have power to 'pierce the corporate veil' when the realities require it."

Petitioners have not, and can not, advance any reasons why the Whitney-New Orleans type transaction should have a special exemption, not available anywhere else in the corporate world, from the doctrine of piercing the corporate veil to avoid evasion of legislative intent. Indeed, they have plainly misconceived the judicial thrust of the doctrine. In its application, courts do not deny the existence of operating differences between the corporations concerned. What they do is to examine the cir-

cumstances to ascertain whether the two corporations are being utilized in such a manner as to patently evade legislative policy. If so, the corporate distinction (and operating differences inherent therein) will be disregarded. This is precisely, of course, what this Court did in the *Anderson* case, *supra*, pp. 29-30, when it refused to allow National bank stockholders to avoid the assessment on their stock under the National Bank Act by exchanging the same for stock of a bank holding company, even though the transaction was entered into in good faith.

Petitioners, however, would go even further. They would contend, in the face of the positive and unequivocal expression of Congressional intent in the legislative history of Section 36(c) to assure a "policy of equalization" in the matter of branching for National and State banks (pp. 16-25 *supra*), that Congress somehow really actually intended an avoidance of the branch restrictions of Section 36(c) of the National Bank Act by the Whitney-New Orleans transaction here involved. They base this contention upon two subsidiary lines of argument: (1) a long recognition by Congress of the distinctions between group and branch banking; and (2) legislative history from the Banking Act of 1933, and the Bank Holding Act of 1956. These arguments are without merit.

Distinctions between group and branch banking. Petitioners' argument, as we read their briefs, runs something like this: because "of legal restrictions on branch banking, banks have resorted—both before and since 1927—to the alternative methods of chain banking and holding company banking so as to obtain as many of the advantages of branch banking as may legally be had" (Petitioner Whitney-Jefferson brief, p. 17); Congress has been aware of this practice and has never declared that it violated branch banking restrictions; and, therefore, the Whitney-New Orleans transaction squarely fits within

Congressional approval of this multiple-unit banking system tradition. The *Amicus Curiae* would quarrel with *all* of these propositions.[1]

To begin with, the implication of Petitioners' arguments to the effect that it is a common practice to organize a bank holding company in order to avoid State branch law; that the growth of the bank holding company system can be entirely attributed to this motivation; and

---

[1] Argument in this brief will not embrace the question of "chain banking" raised in the foregoing quotation from the brief of Whitney-Jefferson Parish. Chain banking is not an issue in this case. It should be noted however, that if State law considers chain banking an evasion of branch banking—which is not the case in Louisiana—the *Amicus Curiae* would take the same position with regard to any effort to use the chain banking route to evade branch banking laws as it does toward the group banking transaction involved herein. In this respect, it agrees with the cogently reasoned dissent of Judge Bastian in *Camden Trust Co.* v. *Gidney*, 112 U.S. App. D.C. 197, 301 F.2d 521 (1962), *cert. denied* 369 U.S. 886. It should also be noted however, that it is quite reasonable for a state to take different positions with regard to chain and group banking insofar as they may be considered evasive of State branch restrictions. This is so because the two systems have one vital distinction, namely the element of control. Control in a chain banking system has the inherent limitation of terminating when stock ownership is dispersed through sales or through disposition in estates of the stockholders. On the other hand, group banking, involving corporate rather than individual stock control of one or more banks, has no such limitation, and control can be "locked in" perpetuity, as is obviously the case of a branch of a bank forming part of the same corporation. Lamb, *Group Banking*, pp. 55-58 (1961): Fischer, *Bank Holding Companies*, p. 19 (1961). It is because of the lack of control element that "the importance of chain banking has diminished over the years", Fischer, *supra*, at 19. Indeed, it was the very lack of control involved in chain banking which led the Whitney-New Orleans to choose the holding company route to acquire a banking office in Jefferson Parish (R. 32), although Petitioners' briefs would now appear to merge the concepts of chain and group banking and to suggest that they are merely different routes to achieve the same end, and that Whitney-New Orleans should therefore be able to follow through with its transaction to meet the competition alleged to have resulted from the fact that some of its competitor New Orleans banks have affiliate banks in Jefferson Parish under chain banking.

that therefore, there is nothing unusual or different about the Whitney-New Orleans transaction which merely reflects the mainstream of "twentieth century banking", are not an entirely faithful reflection of the history of the concept of bank holding companies. It is true, of course, that there are, and always have been, a number of advocates of unit banking who have opposed the very concept of bank holding companies as moving in the direction of branches to which they are vigorously opposed. But it does not follow from a recitation of such views that the impetus in the development of bank holding companies was, in fact, merely a desire to evade branch restrictions.

Prior to 1927, there were very few bank holding companies.[1] This fact in and of itself seems strange, in the light of Petitioners' contention, because National banks were then prohibited from establishing any branches and were suffering competitively where State law granted that privilege to their competitor State banks. (pp. 17-19, *supra*). Surely if the development of bank holding companies could be traced to a desire to evade branch restrictions, there would have been more of these systems at a time National banks were prohibited from establishing *any* branches.

The fact is that the great surge in the formation of bank holding companies took place in the relatively short period of time—between 1927 and 1930.[2] Fischer, in his scholarly and authoritative work on bank holding companies cited by both Petitioners, has set forth a number of reasons for this phenomenon, only one of which related to branch restrictions since many of these institutions were found in the leading branch banking states.[3] He gave considerable importance to such factors as (1) the

[1] "Banking Studies", note 1, p. 12 *supra*, at p. 134.

[2] *Idem.*

[3] Fischer, note 1, p. 33, *supra*, at 24.

need for rural bank reform, (2) the general merger movement of the 1920's, (3) the fear of other groups and loss of correspondent business; and (4) the bull market of the late 1920's.[1]

Nor is there any indication of any growth in bank holding companies after the 1927-30 surge reflecting a desire to avoid branch restrictions. Indeed, on the contrary, during the next decade the number of bank holding companies *declined* from a peak of 97 in 1931,[2] to 41 in 1939.[3] During the 1955 Congressional hearings preceding the passage of the Bank Holding Company Act of 1956, the number had further declined to 34.[4]

Furthermore, the type of bank holding companies existing at the time of the 1955 hearings bore no resemblance to the Whitney-New Orleans type transaction designed to avoid branch restrictions. Mr. Belgrano, the President of Transamerica Corp., one of the largest of the bank holding companies, gave a good description of these 34 *investment* companies as follows:

> "Individuals with funds to invest usually distribute their shareholdings among several different enterprises. They may invest in a single type of business or among different businesses. . . .
>
> Bank holding companies follow this same general pattern. There are approximately 34 bank holding companies today. . . .
>
> Like an individual, bank holding companies are interested in having sound and profitable investments. In varying ways and in varying degrees the com-

---

[1] Fisher, *supra*, note 1, p. 33, at pp. 19-27.

[2] "Banking Studies", note 1, p. 13 *supra*, at p. 134.

[3] *Idem.*, at 136.

[4] Hearings before the House Committee on Banking and Currency, "Control and Regulation by Bank Holding Companies", 84th Cong., 1st Sess., p. 283, (1955).

panies lend financial and other assistance to the concerns whose shares they hold; . . ." [1]

Transamerica, like most of the larger bank holding companies, then held, in addition to bank stocks, substantial investments in insurance companies, real estate, manufacturing and industrial interests,[2] for it wes not until the Bank Holding Company Act of 1956 that bank holding companies were restricted in their non-bank holdings.[3]

In the light of the foregoing, Petitioners' efforts to argue that the Whitney-New Orleans transaction somehow fits within the mainstream of the multiple-unit banking tradition in this country which has been treated by Congress apart from branching, are to no avail. There is a vast difference between the typical bank holding company organized for investment purposes, which *is* in the mainstream of the multiple unit banking tradition, and the transaction here involved of one bank setting out to capitalize a holding company, and through it, an affiliate in an adjoining Parish, all for the purpose of avoiding State branching law. The Court below was therefore clearly correct in distinguishing the transaction here involved from the long-established bank holding company involved in the *Billings* case, *supra*, p. 31, which had been operating for 30 years and possessed stock in 87 banks with 94 offices. (R. 474). See also, South Da*kota* v. *The Nat'l Bank of South Dakota*, No. 17460 (8th Cir. Aug. 10, 1964). Slip. Op. 9, affirming the District Court in 219 F. Supp. 842 (S.D.S.D. 1963), where the court declined to pierce the corporate veil of the transaction there involved concerning, in part, the First Bank Stock Corporation. The Court there noted that this bank holding company "existed as a separate corporation own-

---

[1] Hearings, *supra*, note 4, p. 35.

[2] Lamb, note 1, p. 33 *supra*, at p. 28.

[3] 70 Stat. 135, 12 U.S.C. § 1843.

ing stock of national and other banks, for a considerable period of time." It concluded that "in this respect, this case differs materially from *Whitney Nat'l Bank* v. *Bank of New Orleans & Trust Co.*, supra."

Nor is there any indication of an historical practice of Whitney-New Orleans type transactions of which Congress could have been aware, and thus have condoned through any silence. Indeed, clear-cut proof of this fact lies in the single statistic that there are only 52 registered bank holding companies today in all of America.[1] Surely if the Whitney-New Orleans type transaction had been "usual", banks in all of the many states which prohibit branching would have discovered this "good thing" long ago, and there would be more than just 52 such systems in America today! Or, stated differently, if the Whitney-New Orleans type transaction had been "usual", there would not have been a *decline* in the total number of bank holding companies since the early days of the branch bank restrictions of Section 36(c) of the National Bank Act!

Banking Act of 1933 and the Bank Holding Company Act of 1956. Finally, Petitioners endeavor to derive Congressional assent to the Whitney-New Orleans transaction from the fact (1) that Congress did not tie in branch banking restrictions to bank holding company operations at a time it was legislating on both subjects in the Banking Act of 1933, and (2) that the Senate struck a provision contained in the House version of the Bank Holding Company Act which would automatically apply State laws concerning branch banking to bank holding company operations. These facts, they contend, are conclusive of a Congressional expression of such a difference between group and branch banking that a subsidiary of a bank holding company can *never* be considered a forbidden branch under 12 U.S.C. 36(c).

---

[1] As of December 31, 1963. 1964 Fed. Reserve Bulletin 783.

One simply cannot read the legislative history of the branch banking provisions of the Banking Act of 1933 (pp. 20-25, *supra*), with all of the emotion and vigor with which those great debates were charged, and conclude that at the same time Congress forged the final link in the "policy of equalization" in branch banking, it was intentionally authorizing an "out" through the Whitney-New Orleans type transaction. To the extent Congress did deal with bank holding companies in that legislation—and the issues surrounding bank holding company regulation by no means approached the intensity and importance of the branch banking amendments—it was concerned with the typical bank holding company, organized for *investment* purposes and usually holding, as noted above, non-bank as well as bank, securities in its portfolio. Therefore, the failure of Congress to tie-in such regulation with branch law cannot possibly be considered an indication of Congressional endorsement of the Whitney-New Orleans transaction, involving a single bank setting out to capitalize a holding company for the sole purpose of securing an affiliate in a location where it is prohibited from branching.

Nor can the Senate rejection of the House version of the Bank Holding Company Act rejecting a tie-in of branch laws to approval of bank holding companies be construed as endorsing the Whitney-New Orleans transaction. Opposition to this tie-in developed during the course of the hearings on the grounds that, because of the distinctions between branching and the orthodox bank holding company organized for investment purposes, a *State* might wish to handle group and branch banking in a different manner, and therefore, should not be bound by its branch banking policy in dealing with group banking. Chairman Martin of the Federal Reserve Board so testified:

> "As the Board has previously indicated, it believes that regulation of bank holding company groups

should not be related to the branch banking laws of the States and *that the States should be left free to deal differently, if they desire, with these two types of multiple office banking.*" (Emphasis supplied)[1]

And this is *precisely* what some States have done—although permitting branch banking, either unlimited or in some form, they have at the same time restricted or prohibited bank holding companies. Compare Appendix A and B of this brief.

But, again, the simple logic referred to earlier in this brief would conclusively answer Petitioners' contention. Surely, if Congress had intended, by its rejection of the House proposal to provide a tie-in of branch banking laws with bank holding company approval to give a "green light" to banks which wished to avoid the statutes of the many States which prohibit or restrict branch banking (Appendix A) by organizing bank holding companies, there would be more than just fifty-two bank holding companies registered under the Bank Holding Company Act today.[2]

* * * *

The present Comptroller of the Currency is a vigorous and able advocate of branch banking.[3] He believes that

---

[1] Hearings, note 4, p. 35, *supra*, at p. 17. See also, Hearings Before a Subcommittee of the Senate Committee on Banking and Currency, "Control of Bank Holding Companies", 84th Cong., 1st Sess., pp. 47-48, 77-78 (1955).

[2] This figure represents an increase of only eight registered bank holding companies since the end of 1957, the first full year of the operation of the Bank Holding Company Act. See, "Recent Developments in the Structure of Banking", Special Staff Report of the Board of Governors of the Federal Reserve System submitted to the Select Committee on Small Business, United States Senate. Committee Print, 87th Cong., 2nd Sess., p. 9.

[3] See, e.g., Hearings before the House Committee on Banking & Currency (Conflict of Federal & State Banking Laws), 88th Cong., 1st Sess. (1963).

there should be unlimited branch banking on a National scale without regard to what he considers to be restrictive State branch laws. Others disagree with him. They believe that the question of branching should continue to be decided, as Congress has decreed, by State legislatures which can take into consideration local conditions which vary from State to State. This debate, however, is one which should be decided on the floor of Congress, not by an endorsement of intricate corporate maneuvers designed to evade State branching law by which he is bound under Section 36(c) of the National Bank Act. The desirability of the end result (in the Comptroller's opinion) does not justify such means, as the Court of Appeals below found.

Accordingly, Petitioners submit that the issuance of a certificate of authority to Whitney-Jefferson would constitute an unlawful evasion of the provisions of Section 36(c) of the National Bank Act. Such action would violate the positive, unequivocal and dominant expression of Congressional intent to insure equality between National and State banks in the matter of branching. The corporate veil of the intricate transaction here attempted should be pierced, and Whitney-Jefferson revealed as a forbidden branch of Whitney-New Orleans.

II. The issuance of a certificate of authority to Whitney-Jefferson would also be in violation of Section 3(5) of Louisiana Law 275 of 1962, enacted under a reservation of power from Congress to a state to prohibit or restrict the growth of bank holding companies incorporated under the laws of that State.

Section 3(5) of Louisiana Law 275 of 1962 prohibits any subsidiary of a bank holding company not now opened for business from doing so. This provision is part of a statute reflecting a policy of Louisiana to prohibit all bank holding company systems within the borders of the State.

As noted at pp. 10-16, *supra*, the question of whether a specific State law is applicable to National banks is not to be answered by reference to the broad and admitted generality that National banks are instrumentalities of the Federal Government and subject to the paramount authority of the United States. The answer lies in a search for Congressional intent as to the applicability of such State law to National banks. In the banking field Congress has given a special significance to the applicability of State law to the National banks which it has created. It has intended an applicability of such law in many of the most important areas of banking, either by specific adoption of such State law as the standard for National banks, or by declining to occupy the field so as to preclude the application of State laws to National banks which do not conflict with Federal law. It did so because only by a "policy of equalization" in basic competitive areas can the dual banking system, as a practical matter, survive.

Accordingly, the issue before this Court with regard to Louisiana Law 275 of 1962, is whether Congress intended to permit States to be more restrictive in their regulation of bank holding companies than is contained in the Bank Holding Company Act of 1956. A number of States, beside Louisiana, have considered this matter to have long since been settled law and have passed such statutes. (See Appendix B.) Petitioners now raise a general challenge to that proposition.

A. *In Section 7 of the Bank Holding Company Act, Congress has clearly and unequivocally expressed its intent that a State may prohibit, or restrict the expansion of, bank holding companies and their subsidiaries, whether National or State banks.*

Section 7 of the Bank Holding Company Act of 1956, 70 Stat. 138 (1956) 12 U.S.C. § 1846 (1958) reads as follows:

"§ 1846. Reservation of Rights to States.

The enactment by the Congress of the Bank Holding Company Act of 1956 shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof."

There is no question whatever but that when Congress reserved all powers and jurisdiction of the States over "banks" and "subsidiaries" of bank holding companies in the foregoing provision, it intended to embrace National bank subsidiaries, as well as State bank subsidiaries. The word "bank" is defined to mean "any national banking association or any State bank. . . ." 70 Stat. 133 (1956), 12 U.S.C. § 1841(c) (1958). The word "subsidiary" is defined to mean "any company" in a stated relationship to a bank holding company, 70 Stat. 134 (1956), 12 U.S.C. § 1841(d) (1958) and the word "company" is defined to mean "any corporation, business trust, association, or similar organization . . .", 70 Stat. 133 (1956) 12 U.S.C. § 1841(b) (1958). If the word "company" did not embrace a National bank, National bank subsidiaries would be completely exempt from *all* of the provisions of the Act.

There is also no doubt concerning the scope of the "powers and jurisdiction" which a State "now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof" which Congress intended to reserve to the States. *At the time the Bank Holding Company Act was passed there were several States which prohibited, restricted the expansion of, or regulated bank holding companies, some of which had been on the books for many years.* (See Appendix C attached hereto.) Congress was certainly aware of such statutes, and it would hardly have gone ahead and have reserved to the States the powers which a State "now has"

if it thought that these *existing* statutes were unconsitutional. Indeed, Senator Robertson of Virginia, the Chairman of the Senate Banking and Currency Committee, and the author and sponsor of the Bank Holding Company Act of 1956, made the following statement on the floor of the Senate with regard to the reservation of powers to the States in Section 7:

> "It should be noted that another provision of the Senate bill expressly preserves to the States their present authority over bank holding companies within their respective borders. Therefore, each State may, within the limits of its proper jurisdictional authority, enact legislation to regulate bank holding companies. Mr. President, *as an example of the type of legislation the States may enact*, I ask unanimous consent to have printed in the Record the text of a bill recently passed by the Georgia legislature." 102 Cong. Rec. 6752 (1956) (Emphasis supplied).

The text of the Georgia statute which Senator Robertson gave *as an example of the type of legislation the States may enact* is set forth herein as Appendix D, and should resolve *any* doubt as to the scope of the power over National bank subsidiaries which Congress intended to reserve to the States. That statute defined a "bank holding company" as a company incorporated under the laws of Georgia which controls "2 or more banks." In Section 2(a) a "bank" was defined as "any National bank or State bank." The statute, which carried heavy penalties, forbade any expansion of a bank holding company system beyond 2 banks.

The foregoing is clear and unequivocal. The *Amicus Curiae* must, therefore, differ strongly with the position taken by the Petitioners that the reservation of rights to the States in Section 7 was somehow weakened by the following language in the Senate Report:

> "In order to clarify the legislative history of section 7, the committee wishes to emphasize that this

> section does not grant any new authority to States over national banks." S. Rep. No. 1095, Part 2, 84th Cong., 2nd Sess., p. 5 (1956).

That sentence means just what it says: Section 7 does not constitute a grant of any *new* authority to the States which they do not already have beyond, for example, the authority contained in the Georgia statute which Senator Robertson gave as an example of a statute *which States may enact.*

Further, the legislative history of the Bank Holding Company Act makes it clear that the reservation of power to the States in Section 7 harmoniously meshes with the overall statutory scheme of the Bank Holding Company Act.

Thus, one of the purposes of the Act was to *supplement*, not *replace*, State authority. One of the major problems confronting States was their inability to prevent out-of-State bank holding companies from acquiring banks within the States. This was so because the States had no jurisdiction over such out-of-State companies inasmuch as they were not "doing business" there.[1] The Act, therefore, specifically barred any bank holding company from acquiring any additional bank, State or National, located outside of the State in which it maintains its principal office unless the statute of the State in which such additional bank is located authorizes an out-of-State bank holding company to acquire a State bank. 70 Stat. 135 (1956), 12 U.S.C. § 1842(d) (1958). It would be most incongruous for Congress to bar all out-of-State bank holding companies from operating in a State which by State statute restricts such a system, but to deny a State the right to restrict such systems within its own borders!

---

[1] H.R. Rep. No. 609, 84th Cong., 1st Sess., pp. 3-4, 7 (1955); Hearings Before the House Committee on Banking and Currency, "Control and Regulation of Bank Holding Companies", 84th Cong., 1st Sess., pp. 160, 164-5, 175-6 (1955).

Another of the purposes of the Act was to set minimum standards for bank holding companies which State law could not contravene, but *not* to prohibit State law from being *more* restrictive regarding bank holding companies. The Senate report in referring to Section 7, makes this point clear:

> "In any event, another provision of this bill expressly preserves to the States a right to be more restrictive regarding the formation or operation of bank holding companies within their respective borders than the Federal authorities can be or are under this bill. Under such a grant of authority, each State may, within the limits of its proper jurisdictional authority, be more severe on bank holding companies as a class than (1) this bill empowers the Federal authorities to be or (2) such Federal authorities actually are in their administration of the provisions of this bill." S. Rep. No. 1095, Part 1, 84th Cong., 1st Sess., p. 11 (1955).

In the light of the foregoing, the *Amicus Curiae* submits that Congress has clearly and unequivocally expressed its intent that a State may prohibit, or restrict the expansion of, bank holding companies and their subsidiaries, whether National or State banks.

B. *Section 3(5) of Louisiana Law 275 of 1962 was enacted pursuant to Section 7 of the Bank Holding Company Act and is constitutional.*

Louisiana Law 275 of 1952, West's La. Rev.Stat.Anno., tit. 6, c. 12, § 1003(5) (1962 Supp.), does not violate the provision of Article VI, Clause 2 of the Constitution relating to the supremacy of federal law. If, as shown above, Congress has clearly and unequivocally expressed its intent that a State may prohibit, or restrict, the expansion of bank holding companies and their subsidiaries, whether National or State banks, then there is no conflict between Louisiana Law 275 of 1962 and federal law, and, therefore, no issue of constitutionality.

This position is sustained by all of the authorities on this point.

Braeburn Securities Corp. v. *Smith*, 15 Ill. 2d 55, 153 N.E. 2d 806 (Ill. Sup. Ct. 1958), concerned the Bank Holding Company Act of 1957 passed by the State of Illinois. Ill. Rev. Stats., C. 16½, §§ 71-76 (1961). This statute specifically defined à "bank" as meaning a "national banking association" (§ 72) and made it unlawful for any bank holding company to acquire control of more than 5% of the voting shares of "any bank" (§ 73 (2)). The Illinois Supreme Court upheld the applicability of the Act to National banks as follows:

> "In 1956 Congress adopted legislation regulating bank holding companies (12 U.S.C.A. § 1841 et seq.) and provided, among other things, that its action should not impair the then jurisdiction of the States, and further specifically provided that administration of the Federal act should be within the confines of State law if any. The Illinois legislation, as well as legislation in New York, New Jersey, Pennsylvania and Indiana, is an acceptance of the suggestion implied in the Federal act that the States should act if, as a matter of policy, bank holding company legislation more restrictive than the Federal act was desired by the States. Further, it seems clear that such State legislation could be applicable to national as well as State banks, since the Congress did not manifest an intent to pre-empt the legislative field. *People ex. rel. First Nat. Bank* v. *Brady*, 271 Ill. 100, 110 N.E. 864; *American Legion Post No. 279* v. *Barrett*, 371 Ill. 78, 20 N.E. 2d 45." 15 Ill. 2d at pp. 61-62, 153 N.E. 2d at p. 810.

The appeal in the *Braeburn* case was dismissed for want of a substantial federal question by the United States Supreme Court, 359 U.S. 311 (1959), an action even stronger than judicial affirmance. *Milheim* v. *Moffat Tunnel Improvement Dist.*, 262 U.S. 710, 716-717 (1923).

Further, the opinion of the Justices of the Supreme Court of New Hampshire was sought in 1959 on the constitutionality of a proposed bank holding company act which, like the Illinois statute, defined "bank" as including National banks, and made it unlawful for any bank holding company to acquire more than 5% of the voting shares "in any other bank." In *Opinion of the Justices*, 102 N.H. 106, 151 A. 2d 236 (N.H. Sup. Ct. 1959), the Court upheld the applicability of the Act to National banks as follows:

> "House Bill No. 272 would apply to national banks doing business in this state. These banks are instrumentalities of the Federal Government created for a public purpose and as such are necessarily subject to the paramount authority of the United States. *M'Culloch* v. *State of Maryland*, 4 Wheat. 316, 17 U.S. 316, 4 L.Ed. 579; *Davis* v. *Elmira Sav. Bank*, 161 U.S. 275, 283, 16 S.Ct. 502, 40 L.Ed. 700; *Henrys* v. *Raboin*, 395 Ill. 118, 69 N.E.2d 491, 169 A.L.R. 927; *Zarbell* v. *Bank of America Nat. Trust & Sav. Ass'n, Wash.*, 327 P. 2d 436. However the proposed bill would not be invalid unless it were found to interfere with the purposes of national banks or to destroy their efficiency or to be in direct conflict with some paramount federal law. *Nugent* v. *Mooney*, 3 Misc.2d 1067, 155 N.Y.S. 2d 611; *Millard* v. *National Bank of Detroit*, 338 Mich. 610, 61 N.W. 2d 804; *Franklin Nat. Bank of Franklin Square* v. *People*, 347 U.S. 373, 74 S. Ct. 550, 98 L.Ed. 767.
>
> "On May 9, 1956, Congress enacted the 'Bank Holding Company Act of 1956' 70 Stat. 133; 12 U.S.C.A. § 1841 et seq. Section 7 thereof (70 Stat. 138; 12 U.S.C.A. § 1846) is entitled 'Reservation of rights to States' and reads as follows: 'The enactment by the Congress of this chapter shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof.'

"As a result of this act and its provisions the question of whether our Legislature has 'the power or jurisdiction to legislate on this subject with reference to national banks chartered under the federal law * * is a question of much importance and perhaps of considerable difficulty.' *State* v. *People's National Bank*, 75 N.H. 27, 33, 70 A. 542, 545. However the Supreme Court of Illinois in the case of *Braeburn Securities Corporation* v. *Smith*, *supra* [15 Ill. 2d 55, 153 N.E. 2d 810], decided on September 18, 1958, held that 'it seems clear that such State Legislation [pertaining to bank holding companies] could be applicable to national as well as State banks, since Congress did not manifest an intent to pre-empt the legislative field.' An appeal from this decision to the United States Supreme Court was dismissed on April 20, 1959, 79 S.Ct. 876, for want of a su'bstantial federal question.

"Furthermore at least seven states (Illinois, New York, Indiana, Kansas, Pennsylvania and Massachusetts) have enacted legislation in this field since Congress passed the Bank Holding Company Act of 1956. It is our opinion based on the wording of the act, its legislative history and the factors enumerated above that House Bill No. 272 would not conflict with any federal statute." 102 N.H. at pp. 109-110, 151 A.2d at p. 239.

In view of the foregoing well-reasoned opinions, the *Amicus Curiae* submits that a State statute prohibiting the expansion of bank holding companies to include National banks within its system is clearly *not* in contravention to Federal law and is constitutional.

In their briefs, Petitioners seek to isolate Section 3(5) of Louisiana Law 275 as a *sui generis* expression, separate and apart from provisions of any other State bank holding company acts, thereby rendering any references to such other acts, or to the *Braeburn* and *Opinion of the Justices* cases, misplaced. This position appears to rest

on the distinction that some statutes, such as the one in Illinois, which prohibit a bank holding company from adding a National bank to its system, do so by prohibiting the acquisition of stock in such a National bank, whereas Section 3 of Louisiana Law 275 includes a number of ways by which a bank holding company is prohibited from adding a National bank it its system, including the provision in Section 3(5), here relevant, of prohibiting a subsidiary of a bank holding company not now open for business, from opening for business.

This is a distinction without legal significance. *Amicus Curiae* readily concedes that there is no other State bank holding company act (see Appendix B) which has exactly the phraseology of Section 3(5) of Louisiana Law 275. This was a special provision inserted by the Louisiana Legislature to meet the exigencies of the transaction involved herein and caused by Whitney's unsuccessful race to complete its program before the Louisiana legislature acted. But as far as the constitutional issues are concerned, there is no difference between provisions which seek to restrict the expansion of a bank holding company to include a National bank in its system (a) by prohibiting the acquisition of stock in such a bank, or (b) by prohibiting such a bank from opening for business, as in Section 3(5). The question in *both* cases is the extent to which Congress reserved the rights of the States to prohibit and restrict the expansion of bank holding companies, and that is the issue which has been explored in detail above.

The error in the position taken by the Petitioners is perhaps caused by its mistaken view that the Whitney-Jefferson Parish holds some special status by reason of the fact that it is already organized, and that all it requires to open up for business is a certificate of authority. There is no such special status. The issuance of the certificate of authority is *vital*. Without it, a National bank

is simply not a lawful bank authorized to do business even though its application may have been approved by the Comptroller. *Cf. Commercial State Bank of Roseville* v. *Gidney, supra,* citing *National Bank of Detroit* v. *Wayne Oakland Bank,* 252 F.2d 537 (6th Cir. 1958), *cert. denied,* 358 U.S. 830. Until the issuance of a certificate, a National bank, whether still on paper, or organized, is still in an embryonic stage. It is the very validity of the issuance of such a certificate which is at issue in this case.

* * * *

It is clear from the foregoing discussion that Section 3(5) of Louisiana Law 275 of 1962 is a constitutional exercise of the power reserved to the States by Section 7 of the Bank Holding Company Act of 1956. It follows, therefore, that Section 3(5) of Louisiana Law 275 of 1962 acts as a bar to the issuance of any certificate of authority to the Petitioner, Whitney National Bank in Jefferson Parish.

CONCLUSION

The *Amicus Curiae* respectfully submits, for the reasons stated, that the issuance of a certificate of authority to the Whitney National Bank in Jefferson Parish would constitute a manifest and unlawful evasion of the fundamental policy of Congress set forth in the branch banking provisions of the National Bank Act, by which the Comptroller is bound. The issuance of such a certificate would also patently violate the provisions of Louisiana Law 275 of 1962, passed under a reservation of power by Congress to the States in Section 7 of the Bank Holding Company Act of 1956.

The *Amicus Curiae* urges this Court to so find.

Respectfully submitted,

JAMES F. BELL
1001 Connecticut Avenue, N.W.
Washington, D. C. 20036
Attorney for Amicus Curiae

Of Counsel:

BRIAN C. ELMER
Pogue & Neal
1001 Connecticut Avenue, N.W.
Washington, D. C. 20036

APPENDIX A

Summary of Branch Banking Statutes Of The 50 States

States Permitting Unlimited Branch Banking

State:

Alaska
Alaska Statutes, 1962, Sec. 06.05.415.

Arizona
Arizona Revised Stat. Anno., Sec. 6-223 (1956).

California
Calif. Financial Code Anno., Sec. 500 (1955).

Delaware
2 Del. Code Anno., Title 5, Sec. 770 (Supp. 1962).

Idaho
Idaho Code, Sec. 26-1001 (Supp. 1963).

Maryland
Anno. Code of Md. 1957, Art. 11, Sec. 65.

Nevada
Nevada Revised Stat., Sec. 660.010 (1960).

North Carolina
Gen. Stat. of N. C., Sec. 53-62 (Supp. 1963).

Rhode Island
Gen. Laws of R.I., Sec. 19-1-13 (1956).

South Carolina
Code of Laws of S. C., Sec. 8-57 (1962).

Vermont
Vermont Stat. Anno., Title 8, Sec. 501 (1958).

States Permitting Restrictive Branch Banking

State:

Alabama
Acts of 1953, 1955, 1957; Code of Alabama, Title 5, Sec. 125(1).

Connecticut
Gen. Stat. of Conn., Revision of 1958, Sec. 36-59.

Georgia
Code of Ga. Anno., Sec. 13-203.1.

Hawaii
Revised Laws of Hawaii, C. 178, Sec. 39.

Indiana
5 Burns Ind. Stat. Anno., Sec. 18-1707.

Kentucky
Ky. Revised Stat., Sec. 287.180.

Louisiana
La. Revised Stat., Sec. 6:54 (1951).

Maine
Revised Stat. of Maine, Ch. 59, Sec. 19-C (1963 Supp.); Ch. 59, Sec. 124 (1963 Supp.)

Massachusetts
Mass. Gen. Laws Anno., Ch. 172, Sec. 11 (1963 Supp.); Ch. 172 A, Sec. 12.

Michigan
Mich. Stat. Anno., Secs. 23.762, 23.762(1).

Mississippi
Miss. Code, Secs. 5228, 5229.

New Hampshire
N.H. Rev. Stat. Anno., Sec. 384-B:2 (1963 Supp.).

State:

New Jersey
N.J. Stat. Anno., Sec. 17:9A-19.

New Mexico
N.M. Stat. Anno., Sec. 48-2-17.

New York
Book 4, Banking Law, Sec. 105.

Ohio
Page's Ohio Revised Code Anno., Title 11, Sec. 1103.09.

Oregon
Oregon Rev. Stat., Sec. 714.050.

Pennsylvania
Purdon's Pa. Stat. Anno., Title 7, Sec. 819-204.1.

South Dakota
S.D. Code of 1939, Sec. 6.0402.

Tennessee
Tenn. Code Anno., Sec. 45-211.

Utah
Utah Code Anno., Sec. 7-3-6 (Supp. 1963).

Virginia
Code of Va., Title 6, Art. 3, Sec. 6-26.

Washington
Revised Code of Wash. Anno., Sec. 30.40.020 (1961).

States Prohibiting All Branch Banking

States:

Arkansas
Ark. Stat. 1947 Anno., 1963 Supp., Sec. 67:205; Sec. 67-340-342.

State:

Colorado
Colo. Revised Stat., 1960 Perm. Supp., Sec. 14-13-1.

Florida
Fla. Stat. Anno., Sec. 659.06.

Illinois
Smith-Hurd Ill. Anno. Stat., Ch. 16½, Sec. 106.

Iowa *
Ia. Code Anno., Sec. 528.51.

Kansas *
Gen. Stat. of Kansas Anno., Sec. 9-1111 (1961 Supp.).

Minnesota
Minn. Stat. Anno., Sec. 48-34.

Missouri *
Vernon's Anno., Mo. Stat., Sec. 362.105, Sec. 362.107.

Montana *
Revised Codes of Mont. Anno., Sec. 5-1028 (1963 Supp.).

Nebraska *
Revised Stat. of Neb., Sec. 8-1, 105.

North Dakota *
N. D. Revised Code, Sec. 6-03-14.

Oklahoma *
Okla. Stat. Anno., Title 6, Ch. 19, Sec. 461 (1963 Supp.).

Texas

Vernon's Civil Stat. of Texas Anno., Art. 342-903.

West Virginia

W. Va. Code Anno., Sec. 3131.

Wisconsin *

West's Wisc. Stat. Anno., Sec. 221.04.

States With No Legislation Authorizing Branch Banking

States:

Wyoming

* These states permit certain offices with limited powers only. Arkansas permits a branch under one very limited circumstance.

APPENDIX B

Summary Of State Laws Affecting Bank Holding Companies (1963)

States Restricting Or Prohibiting Bank Holding Companies

State:

Georgia

Code of Georgia Anno., Sections 13-201.1, 13-207, enacted February 9, 1960 *.[1]

Illinois

Smith-Hurd Ill. Anno. Stat. Ch. 16½, Sections 71 through 76, enacted July 5, 1957.[2]

Indiana

Burns Ind. Stat. Anno., Sections 18-1814 through 18-1817, enacted March 12, 1957.[3]

Kansas

Gen. Stat. of Kansas Anno., Sections 9-504 through 9-507, enacted June 29, 1957.[3]

Kentucky

Ky. Revised Stat., Section 287.030, enacted in 1938.[4]

Louisiana

La. Revised Stat., Title 6, Ch. 12, Sections 1001 through 1006, enacted July 10, 1962.[5]

Michigan

Michigan Stat. Anno., Section 21.10, enacted October 17, 1933. (See *Peoples Savings Bank* v. *Stoddard*, 359 Mich. 297, 102 N.W. 2d 777, 792 (Supreme Court, 1960) (dictum) for applicability to National banks).

Mississippi

Miss. Code, Section 5235, enacted April 2, 1934

State:

Nebraska

Revised Stat. of Neb. Sec. 8-901 through Sec. 8-904, (1963 Supp.) enacted March 12, 1963 [3]

New Hampshire

N.H. Rev. Stat. Anno., Sec. 384-B:1 and Sec. 384-B:3, enacted October 1, 1963 [7]

New Jersey

N.J. Stat. Anno., Sections 17:9A-344 through 17:9A-354, enacted June 5, 1957 [6]

Oklahoma

Okla. Stat. Anno. Title 6, Ch. 21, Sections 551 through 554, enacted March 11, 1963 [2]

Pennsylvania

Purdon's Pa. Stat. Anno., Title 7, Sections 851 through 855, enacted July 11, 1957 [8]

Vermont

Vermont Stat. Anno., Title 11, Section 131, enacted April 1, 1915

Washington

Revised Code of Wash., Section 30.04.230, enacted February 27, 1933.[5]

West Virginia

W. Va. Code Anno., Section 3220, enacted February 28, 1959 (effective in 90 days).

States Permitting Bank Holding Companies With State Approval

State:

Florida

Fla. Stat. Anno., Section 659.14, enacted May 20, 1953.

State:

Massachusetts

Mass. Gen. Laws Anno., Ch. 167A, Sections 1 through 7, enacted September 21, 1957.

New York

Book 4, Banking Law, Art. III-A, Sections 141-147, first enacted January 29, 1957.

NOTE: The statutes of twelve states expressly include National banks. The statute of Florida is specifically limited in its application to State banks. The statutes of Louisiana, Michigan, and Mississippi apply generally to all banks doing business in those states. The Vermont statute speaks of "corporations", while the statutes of Kentucky and West Virginia present interpretive questions as to the extent of their coverage.

---

[1] Company cannot acquire more than 5% of the stock of two or more banks.

[2] Company cannot acquire more than 15% of the stock of two or more banks.

[3] Company cannot acquire more than 15% of the stock of two or more banks.

[4] Company cannot acquire more than 50% of the stock of a bank.

[5] Company cannot acquire more than 25% of the stock of a bank.

[6] Company owning more than 25% of the stock of a bank cannot acquire more than 10% of the stock of another bank.

[7] Company is limited to 12 bank affiliates and 20% of state's bank deposits.

[8] The date of enactment is in each case the date that the statute presently effective became effective in its original form.

APPENDIX C

Summary of State Laws Restricting Or Prohibiting Bank Holding Companies Prior to the Passage of the Bank Holding Company Act of 1956[1]

State:

Georgia

Ga. Laws 1956, Vol. 1, pp. 309-312, enacted February 27, 1956. See Appendix D.[2]

Illinois

Ill. Laws 1955, 69th Gen. Assembly, at pp. 1372 and 1373, enacted July 11, 1955. Company cannot acquire more than 15% of the stock of two or more banks.[3]

Kentucky

See Appendix B.

Michigan

See Appendix B. Corporation may not hold bank stock unless it was acquired as part of a plan of reorganization.

Mississippi

See Appendix B. Prohibits bank holding companies.

South Carolina

See Appendix B.

Vermont

See Appendix B.

Washington

See Appendix B.

West Virginia

See Appendix B. Prohibits bank holding companies.

---

[1] May 9, 1956.

[2] These sections, quoted in Appendix D, were repealed on February 9, 1960, when the presently effective Section 13-207 was enacted.

[3] Repealed on July 5, 1957, when the presently effective Sections 71-76 were enacted.

APPENDIX D

GEORGIA BANK HOLDING COMPANY ACT OF 1956

"BE IT ENACTED BY THE GENERAL ASSEMBLY OF GEORGIA AS FOLLOWS:

SECTION 1. The maintenance of competitive services between banks has been found to be the best method of serving the public. There are dangers in the concentration of economic power through centralized control of banks. It is, therefore, held to be in the public interest to curtail such concentration of economic power by preventing the expansion of bank holding companies and similar organizations.

SEC. 2. Unless the context requires otherwise: (a) 'Bank' means any national bank or State bank, banking association, savings bank or trust company, whether organized under the laws of Georgia, the laws of another State, or the laws of the United States, doing business in the State of Georgia.

(b) 'Company' means any bank, corporation, partnership, joint stock company, business trust, voting trust, association or similarly organized group of persons, whether incorporated or not, and includes the shareholders, and those persons who otherwise own the company and including any foreign corporation or other organization or association doing business in Georgia, but shall not include any corporation or community chest, fund or foundation, organized and operated exclusively for religious, charitable, scientific, literary or educational purposes, no part of the net earnings of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation.

(c) 'Bank holding company' means any company incorporated or organized under the laws of the State of Georgia or doing business in Georgia, which directly or indirectly owns, controls or holds, with power to vote, 15 percent or more of the voting stock of each of 2 or more banks.

(d) A company will be construed to own, control or hold, with power to vote, stock indirectly whenever any officer or shareholder of such company or any natural person included within the definition of 'company' in section (b) of this Act or any member of the immediate family of such officer or shareholder or of such natural person, shall own, control or hold, with power to vote, such stock. Immediate family includes a spouse, children, mother, father, brother, and sister.

SEC. 3. It shall be unlawful for any company directly or indirectly to own, control, vote, or hold, with power to vote the same, 15 percent or more of the voting stock of each of 2 or more banks, except that it shall not be unlawful for a company to continue to own, control, vote, or hold, with power to vote, such voting stock as its own, controls, or holds on the effective date of this act. Also, in municipalities now having branches of a bank with a holding-company relation, such bank may make branches of existing holding-company banks; and in the future in cities of over 80,000 population, according to the 1950 or subsequent census, now having branches of a bank, present branches will have the same privilege of additional branches as permitted to other banks.

SEC. 4. It shall be unlawful for any company directly or indirectly to own, control, vote, or hold, with power to vote the same, 15 percent or more of the voting stock of a bank holding company, except that it shall not be unlawful for a company to continue to own, control, vote, or hold, with power to vote, that stock of a bank holding

company which it owns, controls, or holds on the effective date of this act.

SEC. 5. It shall be unlawful for any company hereafter to acquire, with power to vote the same, 15 percent or more of the voting stock of each of 2 or more banks, except that it shall not be unlawful for any company to acquire, with power to vote the same, any stock in banks, a majority of whose voting stock such company owns, holds, or controls on the effective date of this act.

SEC. 6. It shall be unlawful for any company to acquire, with power to vote the same, 15 percent or more of the voting stock of a bank holding company.

SEC. 7. It shall be unlawful for any foreign company owning, controlling, or holding, with power to vote the same, 15 percent or more of the voting stock of each of 2 or more banks, to vote more than 15 percent of the stock of more than 1 such bank in any 1 year, except that it shall not be unlawful for a company to vote that voting stock which it owns, controls, or holds on the effective date of this act.

SEC. 8. This act shall not apply to the holding by a company in respect of its owning, controlling, or holding, with power to vote, stock in a bank or banks or bank holding company or companies in a fiduciary capacity, unless such stock is held for the benefit of another company or for the benefit of a majority of the stockholders of such bank.

SEC. 9. Any company which violates any provision of this act shall, upon conviction, be fined not less than $500 nor more than $1,500. Each day on which such violation occurs will constitute a separate offense.

SEC. 10. If any provision of this act or the application of any such provision to any person or circumstance shall be held invalid, the remainder of the act, and the applica-

tion of such provision to persons or circumstances other than those to which it is held invalid, shall not be effected thereby.

SEC. 11. All laws and parts of laws in conflict with this act hereby are repealed.

(Ga. Laws 1956, Vol. I. pp. 309-312. Repealed February 9, 1960. See Code of Ga. Anno., Section 13-207)